

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE
MANAGEMENT, et al.,

Petitioners,

and

KITSAP COUNTY ASSOCIATION OF
REALTORS,

Intervenors,

v.

CITY OF BAINBRIDGE ISLAND AND THE
WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondents

CASE No. 14-3-0012

(PRSM)

**ORDER ON MOTION TO SUPPLEMENT
THE RECORD**

This matter came before the Board on Petitioners' motion to supplement the record.
The Board had before it the following submittals from the parties:

- Motion to Supplement the Record, filed by Petitioners, December 15, 2014.
- Declaration of Linda Young in Support of Motion to Supplement the Record, with Exhibits 3a to 3w.
- Declaration of Gary Tripp in Support of Motion to Supplement the Record, with Exhibits A-Z.
- Declaration of Dick Haugan in Support of Motion to Supplement the Record, with Exhibits A-G.
- Declaration of Don Flora in Support of Motion to Supplement the Record, with Exhibits A-cc.

- Declaration of Alice Tawresey in Support of Motion to Supplement the Record, with Exhibit A.
- Department of Ecology's Response to Petitioners' Motion to Supplement the Record, December 19, 2014.
- City of Bainbridge Island's Response to Petitioners' Motion to Supplement the Record, December 24, 2014.

Petitioners' Reply in Support of Motion to Supplement was untimely filed.¹

DISCUSSION AND DECISION

The Board bases its decisions on a jurisdiction's compliance with the Growth Management Act (GMA), State Environmental Policy Act or the Shoreline Management Act (SMA) on the basis of the record developed by the city, county, or state. RCW 36.70A.290(4); *Elizabeth Mooney and Janet Hays v. City of Kenmore and Dep't of Ecology*, GMHB Case No. 12-3-0004, Order on Motions to Supplement the Record (Dec. 10, 2012), at 2. The index of the record should list "all material used in taking the action which is the subject of the petition for review, including materials submitted in public comment." WAC 242-03-510(1). "To the extent such documents were submitted to the jurisdiction or a part of the jurisdiction's proceedings prior to the challenged action, they are presumed admissible subject to relevance." WAC 242-03-510(3).²

Additionally, the Board may supplement the record if evidence not included in the record is "necessary or of substantial assistance to the board in reaching its decision." RCW 36.70A.290(4). WAC 242-03-565(1) specifies "a motion to supplement the record . . . shall state the reasons why such evidence would be necessary or of substantial assistance to the board in reaching its decision" (emphasis added). "[T]he burden is on the moving

¹ Petitioners' Reply is untimely. The amended case schedule, at Petitioners' request, deferred the reply deadline from December 18 to January 2. Filings are due by 5 p.m. on the designated day; if later, they are stamped received and forwarded to Board panel members on the next business day. Petitioners' Reply was not received electronically until 5:40 p.m. Friday January 2 and is stamped on the next business day, Monday January 5, 2015. In recognition that Petitioners' prehearing brief is due January 14, when the supplementation reply was not received by 5 pm Friday, the Presiding Officer spent the weekend finalizing the Order on Supplementation.

² The Board notes the City points out that documents submitted to Ecology were not part of the city's proceedings.

1 party to demonstrate the evidence they wish to add is necessary or of substantial assistance
2 to the Board. To satisfy this burden, the moving party should explain what is in the
3 evidence that makes it relevant, how it is not available elsewhere in the record, and why
4 consideration of the additional evidence would be necessary or particularly helpful to the
5 Board.” *Mooney*, GMHB Case No. 12-3-0004 at 4.

6
7 Petitioner’s motion fails to discuss how any of the proposed supplements are
8 relevant, not available elsewhere in the record, or are necessary or of substantial assistance
9 to the Board’s deliberations in this matter. First, none of the declarations of the individual
10 petitioners who have submitted proposed supplements identify which documents may be
11 already in the record of either Ecology or the City. The case management chore of reducing
12 duplication and redundancy is thus transferred to respondents or to the Board.³ Second,
13 where specific documents are not already in the record, neither the motion nor the
14 declarations provide any demonstration that the material is likely to be necessary or helpful
15 to the Board.⁴
16

17 **Declaration of Linda Young**

18
19 Both the City and Ecology found confusion in the numbering of Ms. Young’s exhibits.
20 The Board was able to track the documents. Some of Ms. Young’s proposed
21 supplementation consists of electronic forwarding to the City of materials submitted to
22 Ecology or vice versa. To the extent such materials are already in the record,
23 supplementation is **denied**.
24

25 Neither the Petitioners’ motion nor Ms. Young’s declaration provide any argument
26 that the proffered materials are necessary or likely to assist the Board in its decision. The
27 Board nevertheless **admits** those documents which on their face indicate transmittal to
28 Ecology or the City – Exhibits E, G, H, K, M, T, and U.
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32 ³ WAC 242-03-620(1) provides, in part, “The presiding officer shall exclude evidence that is . . . unduly
repetitious.”

⁴ Petitioners’ Reply, which was untimely, still failed to cure defects in identification and authentication or supply
the necessary argument as to how the records would be necessary or of substantial assistance to the Board.

Young Decl. Exhibit Letter	Ecology Index Number	City Index Number	Comment	Board Ruling
A-3a	E-033	City #1824	E-033 Public Comment #4b; City email attaches the same document	In the record
B-3b	E-033, E-385 & 387	City #1836	Ecology Public Comment #4b; forwarded in email to City Council	In the record
C-3c		City #1835	Forwarded to City by G. Tripp	In the record
D-3d			See City #1888 – contains same document	Duplicative
E-3e			Email to City Council 5/13/2013	Admit as Supp. Ex. 1
F-3f	E-033		Email cover letter to City Council enclosing Ecology Public Comment #4	In the record
G-3g			Email to City Council 10/25/2013	Admit as Supp. Ex. 2
H-3h			Email to City Council 10/27/2013	Admit as Supp. Ex. 3
I-3i (1-10)	E-185 through E-195		Items (1) through (10) are materials authored by Dr. Flora some of which are found separately at City ## 640, 871, 872, 938, 939, 994, 1710, 1711, 1713	In the record
J-3j		City #2080		In the record
K-3k			Email to City 8/11/2014	Admit as Supp. Ex. 4
L-3l	E-197		11/17/13 email to City Council forwarding comments sent to Ecology	In the record
M-3m			Email to City Council 7/3/2014	Admit as Supp. Ex. 5
N-3n			Same as K-3k	Duplicative
O-3o			Included in F-3f	In the record
P-3p			Same as M-3m	Duplicative
Q-3q			Same as K-3k	Duplicative
R-3r			Included in F-3f	In the record
S-3s			Email requesting Ecology review status	Deny - superfluous
T-3t			Email to E. Stockdale	Admit as Supp. Ex. 6
U-3u			Email to E. Stockdale	Admit as Supp. Ex. 7

V-3v	E-037 &038			In the record
W-3w	E-197		Same as L-3l above	In the record

Declaration of Gary Tripp

Gary Tripp's substantive comments to Ecology are already contained in Ecology's record. The Board **admits** supplemental documents containing Mr. Tripp's procedural questions to agency staff – Exhibits A-D, F-G.

Mr. Tripp was an active participant in the City's process from the outset, and the City Index contains numerous submittals. However, for the present motion, Petitioners have submitted Exhibit Y containing 224 pages of communications in Mr. Tripp's file, many of them without date or attribution, and without any attempt to determine whether they are already in the City record, and, if not, whether they are necessary or of substantial assistance to the Board in its decision. The City's response identifies some pages of Exhibit Y as contained in its index.

Petitioners have also submitted Exhibit Z, containing 172 pages of unnumbered documents authored by third parties from Mr. Tripp's files. Mr. Tripp states he submitted the Exhibit Z materials to the City during the course of its SMP review from 2009 to 2014, but the City has not found all of them in its Index.

The Board's review indicates the materials in Tripp's files Y and Z are unduly repetitious, containing multiple duplications, both internally and with materials elsewhere in the record. The burden is on the moving party to demonstrate that proposed additional information is necessary or of substantial assistance to the Board. Petitioners have made no effort to identify which of the documents in Y or Z are already in the record and, if not in the record, whether they contain new information or why that information is important to the Board's consideration in this case. Tripp Exhibits Y and Z are **denied**.

Tripp Decl. Exhibit Letter	Ecology Index Number	City Index Number	Comment	Board Ruling
A-D			Tripp emails with B. Nightingale (DOE) and C. Waldbillig (DFW) re: dock replacement process	Admit as Supp. Ex. 8
E	E-033		Public Comment #15	In the record
F-G			Emails with B. Nightingale re: process	Admit as Supp. Ex. 9
H			Email correspondence with third parties	Deny
I			Email correspondence with third parties	Deny
J	E-033		Public Comment #17	In the record
K	E-033		Public Comment #15	In the record
L	E-033		Public Comment #15	In the record
M	E-033		Public Comment #29	In the record
N	E-033		Public Comment #15	In the record
O			Correspondence with B. Nightingale	Admit as Supp. Ex. 10
P	E-033		Public Comment #53	In the record
Q	E-033		Public Comment #17 for Halvorsen email, Tripp email appended below it not sent to Ecology or City	First document in the record; deny second document
R	E-033		Public Comment #112	In the record
S	E-033		Public Comment #3	In the record
T	E-033		Public Comment #15	In the record
U			Email correspondence with third parties	Deny
V	E-033		Public Comment #76	In the record
W	E-033		Public Comment #53	In the record
X			Map (7/11/2014) is likely to be useful	Admit as Supp. Ex. 11
Y		Numerous City ##	224 pages of unnumbered materials from Tripp's files; City record contains pages 1-25, 27-28, 30-43, 45-81, 83-104, 106-224	Deny

Z		Numerous City ###	170 pages of unnumbered documents from Tripp's files; City record contains pages 1-13, 17-31, 35-38, 44-47, 50-56, 62-71, 79-81, 117-120, 131-132	Deny
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Declaration of Dick Haugan

Mr. Haugan's declaration and attached exhibits are not numbered consistently. The Board's analysis follows the numbering on the exhibits. Exhibits A-E are **admitted**.

Exhibit G is represented in Mr. Haugan's declaration and Petitioners' motion as documents provided in response to a public records request, and Exhibit F appears to be the request itself. Petitioners' motion states Exhibit G "is offered to provide the foundation and explanation of the source for obtaining other documents." Petitioner's Motion, at 4. However, neither the requested information nor the responsive documents address the Bainbridge Island Shoreline Master Program. The public records request seeks city communications with a number of environmentalist entities.⁵ On their face, these exhibits are irrelevant to the issues in this case. Exhibits F and G are **denied**. Should Petitioners find a document as a result of the records request that is indeed germane to a specific issue in the case and likely to be necessary or of substantial assistance to the Board's determination, the document **may be offered** by motion in the prehearing brief.

Haugan Decl. Exhibit Letter	Ecology Index Number	City Index Number	Comment	Board Ruling
A, B			Power point and speaking notes for City Council meeting 5-15-2013	Admit as Supp. Ex. 12
C			Email with B. Nightingale	Admit as Supp. Ex. 13
D			Email with B. Nightingale	Admit as Supp. Ex. 14
E			Email with Anne Blair 10/20-30/2013	Admit as Supp. Ex. 15
F			Public Records Request	Denied - Not relevant

⁵ Earthshare, Futurewise, ICLEI (International Council for Local Environmental Initiatives), Washington Environmental Council, Puget Sound Partners, and Agenda 21.

G			Preliminary response to Public Records Request	Denied - Not relevant
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Declaration of Don Flora

Dr. Flora's declaration lists and attaches a number of papers which he states he provided to the City. He apparently did not send his papers to Ecology. However, a number of the Flora papers were provided to Ecology by Linda Young.⁶

The City objects to the inclusion of several exhibits of which they have no record. In the instances where Dr. Flora's papers are specifically addressed to the City, City staff, or SMP work groups, the Board assumes the papers were actually sent and allows supplementation.

In the absence of any argument that specific documents are necessary or of substantial assistance to the Board's decision, other materials which are not in the record or not addressed to the City – Exhibits B, D, G, I, K, O and X - are denied.

Flora Decl. Exhibit Letter	Ecology Index Number	City Index Number	Comment	Board Ruling
A			Appendix to Ex. Q	In the record
B				Denied
C			Cover letter to City, attaching Ex. E	In the record
D				Denied
E	E-195	City # 1711	Includes Ex. C; also in Young Ex. 3i(10)	In the record
F		City #1713	Young Ex. 3i(10) Ex. 7	In the record
G				Denied
H		City #1710	Young Ex. 3i(8) Ex. 4	In the record
I				Denied
J			Appended to Ex. Q	In the record
K				Denied
L			Appended to Ex. Q	In the record
M			Appended to Ex. Q	In the record

⁶ It appears from the City's Index 1707-1713 that Kimberley McCormick provided a number of Dr. Flora's papers to the City Council.

N			Letter to B. Erickson 3-13-2011	Admit as Supp. Ex. 16
O				Denied
P	E-192	City # 640		In the record
Q		City #871, 872	Incorporates as attachments Flora Ex. A, J, L, M	In the record
R		City #938, 939		In the record
S			Letter to City Council 8/17/2011	Admit as Supp. Ex. 17
T		City #994		In the record
U			Letter to City Council 9/15/2011	Admit as Supp. Ex. 18
V	E-188		Young Ex. 3i(5)	In the record
W			Letter to City Council 5/14/2012	Admit as Supp. Ex. 19
X				Denied
Y	E-189		Young Ex. 3i(7)	In the record
Z	E-187		Young Ex. 3i(3)	In the record
AA	E-191		Young Ex. 3i(2)	In the record
BB	E-186		Young Ex. 3i(1)	In the record
CC			Letter to ETAC 10/11/2010	Admit as Supp. Ex. 20

Declaration of Alice Tawresey

The City and Ecology object to supplementation of the record with Ms. Tawresey's declaration. In it, Ms. Tawresey describes her experiences on the Vegetation Work Group and Task Force and her opinions regarding proper conduct of public meetings.

Petitioners indicate that Ms. Tawresey's declaration goes to the public involvement provisions of the SMA. Petitioners' Motion at 4. Petitioners claim that the testimony of Ms. Tawresey "is relevant to the question whether the Board should declare this SMP invalid for substantially interfering with that goal and policy of the SMA and as incorporated with the GMA." *Id.* However, Petitioners make no effort to explain why this testimony would be necessary to the Board.

It is well-established in the Board's GMA jurisdiction that testimonial evidence developed *after* the adoption of a challenged ordinance is not appropriate for supplementation of the record. See *e.g., Honesty in Environmental Analysis and Legislation (HEAL) v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order, at 5 ("Because the Board conducts its review on the record which was before the local government whose action is being challenged, it will not, as a general rule, allow

1 witness testimony.”) The Board has applied this rule to its review of SMP adoption, which is
2 also “on the record.” In addressing requests for supplementation in the challenge to
3 Kirkland’s SMP, the Board advised the petitioners: “The Board does not conduct ‘de novo’
4 hearings, examine witnesses, determine the authenticity of documents, or otherwise
5 engage in fact-finding.” *Mooney*, GMHB Case No. 12-3-0004 at 2. More recently the Board
6 denied a request for discovery depositions, finding sufficient documentation in the record
7 that would allow it to address the issues that the requested depositions raised. *Hood Canal*
8 *Sand and Gravel LLC v. Jefferson County*, GMHB Case No. 14-2-0008c, Order on Motion
9 for Discovery (July 16, 2014), at 4. The Board found no need to develop more information
10 than already existed in the record. *Id.* Similarly here, the record contains sufficient
11 material to allow the Board to analyze the issue of the adequacy of the City of Bainbridge
12 Island’s public participation process without the supplementation of impermissible
13 testimony.
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16 The City’s implementation of public participation has been challenged in this case,
17 and will be before the Board. See issues listed in the Prehearing Order at 10 (Nov. 14,
18 2014). It is unnecessary for the Board to supplement the record with this testimony in order
19 for it to consider the public participation process leading up to the adoption of the Bainbridge
20 Island SMP. Ms. Tawresey’s activity in the public participation process is documented in the
21 City’s Index of Record, #365, 371, 646, 864, 893, 1030, and 1103. Her comments to
22 Ecology regarding flaws in that process are in the record at Ecology Index E-033, Public
23 Comment #23. Further testimony by way of a declaration is unnecessary and is denied.
24

25 Exhibit A to Ms. Tawresey’s declaration is a letter addressed to Anne Blair, June 17,
26 2012, concerning the designation of shoreline homes as non-conforming. The City objects
27 that this letter is not in its record and it has been unable to verify whether Ms. Blair received
28 it. The Board takes the letter at face value and it is admitted.
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Tawresey Decl. Exhibit Letter	Ecology Index Number	City Index Number	Comment	Board Ruling
A			Letter to Anne Blair 6-17-2012	Admit as Supp. Ex. 21

Declaration of Michael Whalen

The Petitioners' Motion indicated inclusion of the Declaration of Michael Whalen. This declaration and accompanying exhibits were not timely filed and served. Supplementation on behalf of Michael Whalen is denied.

ORDER

The materials proposed for supplementation of the record in Petitioners' Motion to Supplement are admitted or denied as set forth in the text and matrices above.

The parties are reminded that items in the record become evidence only as they are cited in the briefs of the parties and attached as exhibits to the briefs. The exhibit must be referenced and tabbed by its index number⁷ or by the supplemental exhibit number provided in this order.

Dated this 5th day of January, 2015.

Margaret A. Pageler, Presiding Officer

⁷ If a document is in both the Ecology and City Indices, either number may be used.